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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**
16

17 DANA PASQUALE,) **CASE NO. 3:11-CV-05265-JCS**
18)
19 Plaintiff,) **REPLY TO OPPOSITION TO**
20) **DEFENDANT'S MOTION FOR SUMMARY**
21 vs.) **JUDGMENT**
22)
23 LAW OFFICES OF NELSON & KENNARD,)
24) **DATE: 04/19/13**
25 Defendants.) **TIME: 9:30 A.M.**
26) **DEPT: G, 15th Fl.**
27)
28

29 Defendant NELSON & KENNARD hereby submits the following
30 Memorandum of Points and Authorities in reply to the Opposition of
31 Plaintiff DANA PASQUALE to Defendant's Motion for Summary Judgment.

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I.

**PLAINTIFF CONCEDES HER ACTUAL KNOWLEDGE OF DEFENDANT'S
IDENTITY AND THE PURPOSE OF ITS CALLS.**

Plaintiff has submitted no admissible evidence to contradict the facts presented by Defendant in its Motion for Summary Judgment. It is undisputed that between May 21, 2010 and August 19, 2010, Plaintiff and Defendant exchanged no less than eight items of correspondence. (See Docket No. 56, Attachment #2, ¶¶ 6-13 and Exs. 1-8 attached thereto). In Defendant's initial correspondence to Plaintiff, it set forth all disclosures required pursuant to 15 U.S.C. 1692g and also Section 1788.11 of California's corresponding Rosenthal Act.¹ (See Docket No. 56, Attachment #2, ¶6).

In three subsequent items of correspondence Defendant advised Plaintiff Nelson and Kennard was a "debt collector attempting to collect a debt. Any information obtained will be used for that purpose." (See Docket No. 56, Attachment #2, ¶¶ 8, 10, 12 and Exs. 3, 5 and 7 attached thereto).

Before any telephonic exchanges took place between the parties, and in response to the correspondence sent by Defendant, the Plaintiff mailed to Defendant no less than four items of correspondence where she expressly acknowledged that she understood

¹ California's Rosenthal Act is derivative of and incorporates the provisions of the Fair Debt Collections Practices Act. Accordingly, Defendant's arguments herein are incorporated and intended to address Plaintiff's Rosenthal Act claim also.

1 that the Law Offices of Nelson & Kennard was a debt collector and
 2 that it was attempting to collect a debt.

3 On May 24th I received a letter from your office
 4 in which it was claimed that I owe \$19,263.06.

5 Please understand that I wish to resolve this
 6 matter at the earliest possible time. However
 7 due to the possibility of error or fraud I must
 8 insist that you validate this alleged debt
 9 explaining why you are demanding the sum of
 10 \$19,263.06. (See Docket No. 56, Attachment #2,
 11 ¶7 and Ex. 2 attached thereto).

12 1. Authority: That this Notice of Dispute of
 13 Alleged Debt ("Notice of Dispute") is sent to
 14 you pursuant to Title 15, United States Code
 15 Annotated ("U.S.C.A") § 1692 et seq, known as
 16 the Fair Debt Collection Practices Act
 17 ("FDCPA"), the legislative purpose of which is
 18 to protect consumers from abusive, deceptive,
 19 and unfair debt collection practices by debt
 20 collectors;

21 2. Your debt collection letter: That I have
 22 received and read your debt collection letter
 23 referenced above, identifying yourself as debt
 24 collectors, . . . (See, Docket No. 56,
 25 Attachment #2, ¶¶ 9, 11 and 13 Exs. 4, 6 and 8
 26 attached thereto).

27 On September 23, 2010, Defendant communicated with the
 28 Plaintiff telephonically. The Plaintiff advised Defendant's
 representative that "she needed time to review her finances." (See
 Docket No. 56, Attachment #2, ¶15 and Ex. 9 attached thereto).
 Plaintiff does not complain of the content of this call. Presumably
 it included all necessary information required to be disclosed
 pursuant to the Fair Debt Collection Practices Act to Plaintiff's
 satisfaction.

1 The Defendant's representative later attempted to telephone
2 Plaintiff but was unable to reach her. Accordingly, a telephone
3 message was left that did not expressly state that the caller was a
4 debt collector, but did advise that the call was from the "Law
5 offices of Nelson & Kennard." (See Docket No. 56, Attachment #2,
6 ¶16).

7
8 Defendant again telephonically communicated with Plaintiff on
9 September 30, 2011. Plaintiff requested a call back at a specified
10 time to discuss a repayment arrangement of the debt. (See Docket
11 No. 56, Attachment #2, ¶17). Plaintiff does not complain of the
12 substance of this telephone call. Presumably the content thereof
13 comported with the provisions of the FDCPA including the full
14 disclosure of the name of the caller, the purpose of the call and
15 the admonition that the caller was a "debt collector."
16

17 Defendant acknowledges leaving three subsequent messages for
18 the Plaintiff that imparted no information about the debt, but each
19 indicated that the caller was from the Law Offices of Nelson &
20 Kennard. Each message was polite, non-argumentative and in no
21 respect contained any false, deceptive or misleading information.
22

23 II.

24 THE MESSAGES COMPLAINED OF BY PLAINTIFF DO NOT VIOLATE THE FDCPA.

25 Defendant submits that the FDCPA was enacted to "eliminate
26 abusive debt collection practices by debt collectors, to ensure that
27 those debt collectors who refrain from using abusive debt collection
28

1 practices are not competitively disadvantaged . . . and to promote
2 consistent state action to protect consumers against debt collection
3 abuses." 15 U.S.C. §1692e. Plaintiff has demonstrated no such
4 abusive behavior by Defendant. Here, Plaintiff admittedly was not
5 confused or misled. The evidence presented is unrebutted that
6 Plaintiff at all times knew the identity of the caller and the
7 purpose of Defendant's calls respecting the voicemails complained
8 of.
9

10 Plaintiff argues that violation should be evaluated under "the
11 least sophisticated debtor" standard. Swanson v. S. Oregon Credit
12 Services, Inc. 869 F.2d 1222, 1225 (9th Cir. 1989); Clark v. Capital
13 Credit and Collection Services, 460 F.3d 1162, 1171 (9th Cir. 2006).
14 Plaintiff urges the court to ". . . ask whether the information
15 provided by the debt collector or the actions of the debt collector
16 are confusing or misleading to the least sophisticated debtor. (See
17 Docket No. 65, at p. 3, lns. 22-24).
18

19 Whether the inquiry is subjective or objective, the answer to
20 the question is clearly no. Where the circumstances are viewed as a
21 whole, including the fact that the consumer affirmatively
22 acknowledged on numerous occasions her actual knowledge of the
23 identity of the caller and the fact that the caller was a "debt
24 collector," the Plaintiff cannot truthfully allege that she was
25 confused or misled by any of the phone messages, nor does she
26
27
28

1 present any such evidence in contravention of the evidence provided
2 by the Defendant.

3 Plaintiff next asks the court to determine whether the actions
4 of the debt collector were harassing to the least sophisticated
5 debtor. (Docket No. 65, p. 4, lns. 6-7). The answer can only be
6 no. It is undisputed that at the time the messages complained of
7 were left, Plaintiff had actual knowledge of the identity of the
8 caller and the purpose of the call. In fact, the calls were
9 specifically invited by the Plaintiff. (Docket No. 56, ¶¶ 15 and
10 17).

12 The least sophisticated consumer is not reside in a vacuum.
13 Whether a defendant violated the FDCPA must be viewed from the
14 vantage point of the consumer, including all facts known to the
15 consumer, be he unsophisticated or not. The analysis includes
16 consideration of all information available to the consumer and is
17 "taken as a whole." Tourgeman v. Collins Financial Services, Inc.
18 2012 WL 3731807 (S.D. Cal. *4). "In assessing FDCPA liability, we
19 are not concerned with mere technical falsehoods that mislead no
20 one, but instead with genuinely misleading statements that may
21 frustrate a consumer's ability to intelligently choose his or her
22 response." Donohue v. Quick Collect 592 F.3d 1027, 1034 (9th Cir.
23 2010).

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III.

REED AND PRESSLEY ARE GOOD LAW AND CONTROL.

Plaintiff argues that because Pressley v. Capital Credit and Collections Service, Inc., 760 F.2d 922 (1985), preceded in 1996 amendment to 15 U.S.C. §1692e(11), that Pressley is no longer good law. As the Court observed in Reed v. Global Acceptance Credit Company, 2008 WL 3330165 (N.D. Cal. August 12, 2008), that distinction is without a difference under the facts presented.

Under the prior version of 15 U.S.C. §1692e(11), the debt collector was required to disclose in all communications with the consumer that the ". . . debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." As a result of the 1996 Amendment to 15 U.S.C. §1692e(11), the Legislature distinguished between the initial communication and subsequent communications limiting the required disclosure in subsequent communications to words that impart that the caller is a "debt collector."

However, in both the prior and subsequent version of 15 U.S.C. §1692e(11), the disclosure was only required where there was a "communication" made in an attempt collect a debt. The 1996 Amendment was intended to harmonize a split among the various Circuits as to the extent of the disclosure required in subsequent communications. Contrary to Plaintiff's assertion, the 1996 Amendment adopted and codified the Ninth Circuit's view of 15 U.S.C.

1 \$1692e(11). As set forth Epps v. Etan Industries, Inc. 1998 WL
2 8511488; *7, Congress lessened the disclosure required in subsequent
3 communications; it did not enlarge it. Nothing in the 1996
4 Amendment to 15 U.S.C. §1692e(11) changed the requirement that there
5 must be a "communication" which imparts information about a "debt"
6 before any disclosure is required.

7
8 Plaintiff offers no evidence that the actions of Nelson &
9 Kennard were any way abusive, false, deceptive or misleading. "The
10 purpose of the Act . . . 'is to protect consumers from a host of
11 unfair harassing and deceptive debt collection practices without
12 imposing unnecessary restrictions on ethical debt collectors.'" Pressley, Supra. at p.925. A follow up letter to a previous demand
13 for payment is not a "communication" under the FDCPA which required
14 the §1692e(11) disclosure.

15
16
17 It is clear from the notice received by Pressley
18 that Capital Credit was attempting to collect a
19 debt and that payment had been requested in a
20 prior communication. There was nothing in the
21 notice itself or in any action of Capital Credit
22 that would be construed as "abusive" or "false,
23 deceptive or misleading." Rather, it was a
24 straightforward notice that repeated the demand
25 for payment no useful purpose would be served by
26 repetition of a former warning in such a follow
27 up notice to a debtor nor was this intended by
28 Congress. Pressley, Id. at p. 926.

25 The case at bar is factually on point but more compelling. It
26 is undisputed that at the time the voicemail messages complained of
27 by Plaintiff were left, she had actual knowledge of the identity of
28 the caller and the purpose of the call. She confirmed her knowledge

1 in at least four prior letters to Defendant and two prior telephone
2 conversations with Defendant's employees. The telephone messages
3 complained of imparted no information concerning any debt. Rather,
4 they were polite, straightforward and could no way be construed as
5 abusive, false, deceptive or misleading, even from the view of the
6 least sophisticated consumer.

7
8 Plaintiff further argues that because Pressley, Id., is not
9 good law, then it follows that the Court's holding in Reed v. Global
10 Acceptance Credit Company (2008 WL 3330165 N.D. Cal. August 12,
11 2008) should also not be followed by this Court. In Reed, the
12 plaintiff received dunning letters concerning her student loan debt
13 from defendant, Global Acceptance Credit Company. The plaintiff
14 mailed one letter to the defendant and stated that she disputed the
15 debt and refused to pay. Global left a series of voicemail messages
16 for Reed which did not directly impart language that the call was
17 from a debt collector."

18
19 In Reed, Judge Whyte observed;

20
21 Subsequent communications only must convey that
22 the communication is from a debt collector (15
23 U.S.C. §1692e(11)). More importantly in the
24 instant case, the Ninth Circuit has held that
25 where the debtor already knows the identity of
26 the debt collector, follow up notices from the
27 debt collector are not communications and do not
28 require compliance with 1692e(11) as long as
they are not misleading or false. Id., at fn. 3
citing Pressley v. Capital Credit Collections
and Service 760 F.2d 922, 925 (9th Cir. 1985).

1 In Reed, Id., the Court denied plaintiff's motion for summary
 2 judgment finding a triable issue of fact as to whether the voicemail
 3 messages conveyed sufficient information to impart that Global was a
 4 debt collector in the context of the facts presented in the case,
 5 applying the least sophisticated consumer standard.

6 No such triable issue is before this court. Plaintiff concedes
 7 her actual knowledge that the Law Offices of Nelson & Kennard was a
 8 debt collector attempting to collect a debt. Each message
 9 complained of informed Plaintiff that the message was from the Law
 10 Office of Nelson & Kennard. Plaintiff offers no evidence that the
 11 messages left by Defendant were in any respect false, deceptive or
 12 misleading. The Reed Court acknowledges that the Court's focus is
 13 on the "totality of the circumstances," including prior
 14 communications between the parties, to determine whether a ". . .
 15 consumer would know the nature and identity of a caller in the
 16 voicemail messages." Reed, Id. at *4. As explained, inter alia, in
 17 Reed, Id. and Tourgeman, Supra, context does matter. The "least
 18 sophisticated consumer" analysis does not ignore the admitted actual
 19 knowledge and facts available to the consumer. Defendant's Motion
 20 for Summary Judgment should be granted.

21 IV.

22 **EVEN IF THE "DEBT COLLECTOR" WARNING WAS REQUIRED TO BE INCLUDED**
 23 **IN THE VOICEMAIL MESSAGES COMPLAINED OF, THE FAILURE TO**
 24 **DO SO WAS UNINTENTIONAL AND OCCURRED AS THE RESULT**
 25 **OF BONA FIDE ERROR, NOTWITHSTANDING THE MAINTENANCE OF**
 26 **PROCEDURES REASONABLY ADAPTED TO AVOID SUCH ERROR.**

1 The purpose of the "bona fide error" defense is to protect debt
 2 collectors in cases of inadvertent clerical error. Baker v. G.C.
 3 Services Corporation, 677 F.2d 775, 779 (9th Cir. 1982). "There is
 4 room within the Act for ethical debt collectors to make occasional
 5 unavoidable errors without subjecting themselves to automatic
 6 liability." Peterson v. Portfolio Recovery Associates, LLC, 2011 WL
 7 6176196 (District N.J. 2011 *4), citing Beattie v. D. N.
 8 Collections, Inc. 754 F.Supp 383, 392. (D. Del. 1991).
 9

10 Defendant has offered Declarations establishing the
 11 circumstances under which the messages complained of were left. No
 12 reasonable inference can be gleaned there from that Defendant's
 13 representatives intended to violate the FDCPA. Plaintiff has
 14 offered no evidence to suggest the Defendant's conduct was
 15 intentional. (See Wilhelm v. Credico, Inc. 519 F.3d 416, 420-421
 16 (N.D. 2008). (Plaintiff ". . . offered no affidavits, depositions,
 17 or other evidence disputing Credico's affidavits. Thus we have no
 18 difficulty concluding that Credico's . . . violation was
 19 unintentional and was caused by a bona fide error of a clerical or
 20 data entry nature.") "The procedures need not be elaborate." Id.
 21
 22

23 Plaintiff acknowledges the policies and procedures Defendant
 24 has in place to avoid the occurrence of the error complained of but
 25 argues that Defendant ". . . has not presented any evidence as to
 26 why the procedures failed in this case." (See Docket 65, p. 12,
 27 lns. 14-15). Defendant is aware of no authority that requires such
 28

1 a showing. If procedures didn't occasionally fail, there would be
2 no need for the defense. Rather, Defendant's burden is to establish
3 that the procedural error occurred notwithstanding the maintenance
4 of procedures reasonably adapted to avoid the error. 15 U.S.C.
5 §1692k(c); Clark v. Capital Credit and Collection Services, Inc.,
6 460 F.3d 1162, 1176-1177 (9th Cir. 2006); Riechert v. National
7 Credit Systems, Inc. 531 F.3d 1002, 1006 (9th Cir. 2008) ("The
8 defense requires the defendant to show that it maintains procedures
9 to avoid errors.") Jenkins v. Heintz. 124 F 3d. 824, 835 (7th Cir.
10 Ill. 1997) ("The defendants have offered un rebutted evidence of the
11 procedures they followed when preparing to file suit to collect a
12 debt to avoid errors and omissions that could result in an FDCPA
13 violation. . . . Where defendants maintain extensive systems designed
14 to prevent errors, an unintentional violation of the Act will not
15 result in liability").
16
17

18 The Tenth Circuit, in Johnson v. Riddle, specifically addressed
19 the requirement that the procedures be adapted to avoid the error:
20 "As the text of § 1692k(c) indicates, the procedures component of
21 the bona fide error defense involves a two-step inquiry: first,
22 whether the debt collector 'maintained'-i.e., actually employed or
23 implemented-procedures to avoid errors; and, second, whether the
24 procedures were 'reasonably adapted' to avoid the specific error at
25 issue." Johnson v. Riddle, 443 F.3d 723, 729 (10th Cir.2006).
26
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28

1 The Defendant has provided direct evidence that the
2 representatives leaving voicemail messages for consumers were
3 provided specific training on the topic as part of a two week
4 classroom training program. (See Docket No. 56, Attachment #2,
5 ¶25). The representatives leaving the voicemail messages were also
6 tested on the proper content of the voicemail message to be left in
7 the circumstance presented. Each passed the test. (See Docket No.
8 56, Attachment #2, ¶26). Each representative leaving the voicemail
9 messages had a voicemail message script to follow posted and
10 available at their desks. Defendant provided ongoing training to
11 these representatives where it used a digital call recording system
12 to review the content of calls with the representatives to ensure
13 compliance with applicable laws and policies of Defendant.
14

15
16 Each level of policy, instruction, supervision and review
17 described aforesaid was directly targeted to avoid the occurrence
18 complained of by the Plaintiff. Plaintiff has offered no evidence
19 that the procedures described herein were insufficient or not
20 reasonably adapted to avoid the occurrence of the error. Where
21 Defendant has shown by a preponderance of evidence that the
22 violation was not intentional and resulted from a bona fide error
23 notwithstanding the maintenance of procedures reasonably adapted to
24 avoid any such error, the burden shifts to establish that the
25 violation of the Act was intentional or alternatively, that the
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1 procedures were not reasonable and/or were not adapted to avoid the
 2 error. Plaintiff has provided no such evidence.

3 V.

4 **NELSON & KENNARD IS EXEMPT FROM LIABILITY UNDER**
 5 **CALIFORNIA'S ROSENTHAL ACT.**

6 California Civil Code §1788.2(c) expressly excludes "an
 7 attorney or counselor of law" from liability under the Rosenthal
 8 Act. "A creditor's counsel retained for the purpose of collecting a
 9 debt is not a 'debt collector' within the meaning of the Rosenthal
 10 Act." Owings v. Hunt & Henriques 210 WL 3489342 at *3 (rejecting
 11 the contention that Section 1788.2(c) exempts lawyers but not law
 12 firms and holding that "Hunt cannot be liable under the Rosenthal
 13 Act"; But see Abels v. JBC Legal Group 227 F.R. D 541, 548 and (N.D.
 14 Cal. 2005) explaining that the Rosenthal Act does not "outright
 15 exclude law firms.")

17 Defendant Nelson & Kennard operates as a general partnership.
 18 (Docket No. 56, Attachment #2, ¶1; Defendant's Answer to Complaint,
 19 ¶10 (Docket No. 11)). Partners are jointly and severally liable for
 20 the obligations of the partnership. California Corporations Code
 21 §16306(a).

23 In the context of a general partnership, no good cause exists
 24 for the distinction suggested in Abels, Id. In no case cited by
 25 Plaintiff is this distinction addressed. That is because there is
 26 no cognizable distinction. Business entities such as corporations
 27 are generally provided a layer of protection insulating the
 28

1 personnel from personal liability for the obligations of the
2 business entity. As noted above, in the context of a general
3 partnership, no such layer of insulation exists. In the context of
4 a general law partnership, for purposes of liability under the Act,
5 there is no distinction between the business entity and its
6 attorneys.

7
8 Accordingly, Defendant NELSON & KENNARD, a law partnership,
9 respectfully urges the Court to adopt the holding in Owings v. Hunt
10 & Henriques, supra, and conclude that in the context of a general
11 law partnership, there is no distinction between the business entity
12 and its lawyers, for liability purposes, and therefore the
13 partnership and its lawyers are exempt under California's Rosenthal
14 Act pursuant to the provisions of California Civil Code §1788.2(c).
15

16 VI.

17 SUMMARY OF RELIEF REQUESTED.

18 Defendant and provided un-rebutted evidence that the Plaintiff,
19 at all times relevant, had actual knowledge of the identity of the
20 caller and the purpose of the call with respect to the voicemail
21 messages complained of in Plaintiff's Complaint. Even from the
22 prism of the least sophisticated consumer armed with this knowledge,
23 The Plaintiff cannot show that Defendant engaged in any abusive,
24 deceitful, false or misleading conduct. The messages complained of
25 clearly stated they were from a law firm and did not impart any
26 information about a debt. Moreover, Plaintiff had actual knowledge
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1 of the caller's identity and purpose of the call. As such, the
2 messages were not communications as defined by the FDCPA.

3 Even if the caller, under these facts, was required to include
4 in the message that the call was from a debt collector, Defendant
5 has demonstrated, without rebuttal, that the omission was
6 unintentional and a product of human error, despite robust policies,
7 training, procedures and scripts reasonably adapted to avoid such
8 errors. For these reasons, Defendant's Motion for Summary Judgment
9 should be granted and Plaintiff's case dismissed, with prejudice.
10

11 In addition, Defendant submits that as lawyers, they are exempt
12 from application of California's Rosenthal act. For this additional
13 reason, Defendant's motion for Summary Judgment should be granted as
14 to Plaintiff's Rosenthal Act claim and the claim should be
15 dismissed, with prejudice.
16

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18 Respectfully Submitted,
19

20 Dated: 03/08/13

21 By: //s// Robert Scott Kennard
22 Robert Scott Kennard
23 Attorney for Defendant
24 NELSON & KENNARD
25
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